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End-of-Life Decisions and the Natural Law

Gregory James Corcoran

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"I fear the power of choice over life or death at human hands. I see no human being whom I could ever trust with such power--not myself, not any other. Human wisdom, human integrity are not great enough….At what point shall we allow this choice? For me the answer is—at no point, once life has begun. At no point, I repeat, either as life begins or as life ends, for we who are human beings cannot, for our own safety, be allowed to choose death, life being all we know."

Pearl S. Buck, Foreword to Robert E. Cooke and others, ed., *The Terrible Choice: The Abortion Dilemma* (New York: Bantam Books, 1968), ix-xi, **x**.

INTRODUCTION

When my Great Uncle John Corcoran received his diagnosis of paracentesis in his nineties after a short hospitalization for stomach bloating and back pain, he response was short: "So, that's the way it's going to be." He accepted some pain medicine, but he was clear of mind as he lingered the next four or five days. One day, after having seen all his family, Uncle John said to his doctor, then on morning rounds, "I'm going into the Valley." That afternoon, he quietly slipped away.

We have talked in class about "the good death." In my family, Uncle John's peaceful and faith-filled acceptance of death in many ways is the definition of the good death. Yet one lesson of our class discussions is that each person has a different, if not definition than conception of what constitutes a good ending in end-of-life cases. What often goes missing, however, is the vision of a good death held by the most important decision maker in such circumstances: the person actually dying. In such an atomized matrix of decision makers, are there universal truths that apply to such end-of-life circumstances? The answer is, I contend, yes: the natural law.

Professor Robert George properly recognizes that natural law "is central to the Western tradition of thought about morality, politics and law."[1] Indeed, America's founders "sought to create institutions and procedures" that enshrined those basic, natural rights that "people possess,

[1] Robert George, *Colloquium Natural Law: Colloquium Natural Law, the Constitution, and the Theory and Practice of Judicial Review*, 69 Fordham L. Rev. 2269, 2269.

not as privileges or opportunities granted by the state, but as principles of natural law which it is the moral duty of the state to respect and protect."[2]

Yet, "[b]ioethics scholars have started to question the application of the traditional principle-based ethical analysis as unnecessarily narrow." "Bioethics: Health Care Law and Ethics."[3] That viewpoint is consistent with Professor George's observation that the twentieth century was marked by "a lively debate" about whether the "Constitution incorporates natural law in such a way as to make it a source of judicially enforceable" rights and guarantees.[4] Indeed, Professor Hadley Arkes observes that "lawyers and judges on the conservative and well as the liberal side, have rather clearly rejected natural law, treated it with derision and contempt…"[5]

A decline in the natural law foundation of U.S. jurisprudence would have far-reaching and ill consequences for a society grappling with, among other things, deepening financial straits in its health-care systems and a federal government that some fear will be taking broader control over those systems,[6] which constitute one-sixth of the United States economy,[7] through the

[2] Id. at 2269-2270.
[3] BARRY R. FURROW, THOMAS L. GREANEY, SANDRA H. JOHNSON, TIMOTHY S. JOST AND ROBERT L. SCHWARTZ, BIOETHICS: HEALTH CARE LAW AND ETHICS, 50, (West Publishing Co., Sixth Ed., 2008).
[4] George, *supra* n. 1, at 2270.
[5] Hadley Arkes, *A Natural Law Manifesto or an Appeal From the Old Jurisprudence to the New*, 87 Notre Dame L. Rev. 1245, 1249
[6] Rick Newman, "The Real Reason Obamacare Scares People," U.S. News & World Report blog, March 23, 2012, *available at* http://www.usnews.com/news/blogs/rick-newman/2012/03/23/the-real-reason-obamacare-scares-people (last checked, Nov. 16, 2012).
[7] Centers for Medicare & Medicaid Services, "National Health Expenditures 2010 Highlights," *available at* http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical.html

legislative mandate of the Patient Protection and Affordable Care Act.[8] (3c PPACA site) One place these tensions are likely to be keenly felt is in end-of-life decisions.

In this article, I will examine the seminal cases dealing with right-to-die jurisprudence to determine the extent to which courts have relied on natural law theories and whether Courts are gradually departing from that natural law foundation. Part I will introduce and explore the meanings of the natural law. Part II will focus on In re Quinlan, the landmark 1976 New Jersey Supreme Court case that was one of the first to deal with the dilemma of withdrawing life-sustaining treatment, a respirator, from a patient who was not terminally ill but also was not conscious. Part III will focus on Cruzan v. Director, Missouri Dept. of Health, the 1990 case in which the U.S. Supreme Court determined that conscious, competent people have a right to refuse medical treatment, but held that a State could enact a procedural hurdle, such as a clear-and-convincing-evidence standard, for determinations of whether an unconscious patient would make a similar decision. Part IV will examine the twin cases of Washington v. Glucksberg and Vacco v. Quill, where the U.S. Supreme Court upheld state laws prohibiting assisted suicide. Part V will look beyond the above landmark cases to how end-of-life decisions have been handled in cases that haven't received as much notice.

I: DEFINING NATURAL LAW

The natural law is a group of "principles of right action" that prescribe behavior for "situations of morally significant choosing."[9] The natural law is, in the words of St. Thomas Aquinas, "the rational creature's participation in the eternal law."[10] The general principles

[8] The text of the legislation is available at www.gpo.gov/fdsys/pkg/BILLS.../pdf/BILLS-111hr3590enr.pdf

[9] Robert George, *Natural Law*, Harvard Journal of Law & Public Policy, Winter 2008, 31 Harv. J.L. & Pub. Pol'y 171, 172.

[10] Thomas Aquinas, Summa Theologica (Question 94, Article 1), *available at* http://www.lonang.com/exlibris/aquinas/index.html.

reasoned from the natural law are "the same for us all as to rectitude and as to knowledge."[11] The Bible alludes to the natural law as "written" on the hearts of all men,[12] while Aquinas referred to the general principles as being "impressed" on human reason "by nature."[13] The natural question is, written by whom? Christians might answer, God the Father; Jews might answer Yahweh; for the Founding Fathers, it was the Creator, or Nature's God. That isn't to say that natural law requires theism or theology. The Greeks, for instance, also knew there existed a higher law. In Sophocles' Antigon, the protagonist defies King Creon's law against the proper burial rites for her brother, declared an enemy of the state, because:

> "It was not God's proclamation. That final Justice that rules the world below makes no such laws. The immortal unrecorded laws of God, they are not merely now: they were, and shall be, operative for ever, beyond man utterly."[14]

Though Antigone appears to invoke a divine authority, because the Greeks lacked a tradition of verbal divine revelation what Antigone was referring to was "principles that everyone with a normal mind knows by means of conscience," or in other words, the laws of Nature.[15] Similarly, the Roman orator and statesman Cicero, in his *Laws,* refers to "Law" as "the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite."[16]

A foundational tenet of natural law traditions is that, though human fulfillment is variegated, each human being has inherent value.[17] Further, this value is not dependent on the

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[11] Id., Question 94, Article 4.
[12] Romans 2:15, *available at* http://www.drbo.org/chapter/52002.htm.
[13] Aquinas, *supra.,* Question 91, Article 3.
[14] Sophocles, Antigone, *available at* http://classics.mit.edu/Sophocles/antigone.html.
[15] J. Budziszewski, *The Revenge of Conscience*, June/July 1998, First Things, *available at* http://www.firstthings.com/article/2008/12/001-the-revenge-of-conscience-38
[16] Id.
[17] Id.

degree to which any human being consciously lives that life. As a result, the laws of society ought to protect each individual life. That is because, as Aristotle said, man is a social animal. Humans exist in communities charged with ensuring and protecting "the common good," rightly understood. As the seventeenth-century natural-law theorist Hugo Grotius said, "The basic requirements of an organized social life are the basic principles of the natural law."[18]

Still, as constitutional scholar Randy Barnett has said, "Adopting a natural-law mode of reasoning does not guarantee that we will act wisely, but it does, I think, point in the direction of wisdom. It tells us what we should be looking for. As important, a proper theory of natural law explains what we usually do look for and why."[19] It is Professor Barnett's usage of natural law, as a mode of reasoning that will guide this paper, though it is against the backdrop of the natural law principle that the taking of life is a moral wrong.

Yale Kamisar, the Clarence Darrow Distinguished University Professor of Law at the University of Michigan, posits that the term "end of life" has been interpreted to include four different "rights": the right to reject or end unwanted medical treatment; a right to commit suicide; a right to assisted suicide; and a right to active, voluntary euthanasia.[20] Courts have recognized only the first right, to reject or end unwanted medical treatment. And while this analysis includes right-to-reject-treatment cases, it is the third "right" that prompted this paper—the emerging issue of physician-assisted suicide. Three states have legal regimes enabling so-

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[18] Randy Barnett, "A Law Professor's Guide to Natural Law and Natural Rights," *Harvard Journal of Law and Public Policy, Summer 1997,* 20 Harv. J.L. & Pub. Pol'y 655, 657, *citing* Hugo Crotius, 2 De Jure Belli AC Pacis Libri Tres 2 (Francis W. Kelsey Trans., Clarendon Press 1925) (1690) (citation omitted.).

[19] Id., at 664.

[20] Yale Komisar, "Right to Die: Good Slogan, Fuzzy Thinking," *First Things,* Vol. X, Issue: December 1993, page 6-9, *available at* http://www.firstthings.com/article/2008/11/002-right-to-die-good-slogan-fuzzy-thinking-45.

called physician-assisted suicide,[21] states that have subordinated the natural law's concern for both the value of each human life and for the common good in favor of the primacy of individual "autonomy." Surprisingly, Massachusetts in the most recent general election rejected a referendum that would have made it the fourth state to allow physicians to consciously aid patients in dying.[22] It was a notable loss, as passage would have given the so-called right-to-die movement its first victory on the East Coast and in a state that considers itself a center of the medical establishment.[23]

Still, the issue remains in the public square. A 1996 study determined that a substantial portion of U.S. physicians had received requests for physician-assisted suicide or euthanasia, with 6 percent of respondent physicians saying they "had complied with such requests at least once."[24] And 36 percent of U.S. physicians surveyed said they would be willing to proscribe medication that would hasten a patient's death if it were legal; 24 percent of respondents said they would provide a lethal injection were that legal.[25] It is instructive to note that two seminal

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[21] Two have done so by ballot (Oregon, via the Oregon Death with Dignity Act, and Washington, via the Washington Death With Dignity Act), while a third has done so by court ruling (Montana, in Baxter v. Montana, though critics claim there continue to be civil and criminal risks to doctors, institutions or persons involved: http://www.montanansagainstassistedsuicide.org/p/baxter-case-analysis.html.)

[22] Associated Press, "Mass. doctor-assisted suicide measure fails," *available at* http://www.boston.com/news/local/massachusetts/2012/11/07/mass-doctor-assisted-suicide-measure-fails/oXZDcgOUbqwhlqzb63FSPO/story.html. For the wording of what was called "Question 2," see http://www.sec.state.ma.us/ele/ele12/ballot_questions_12/quest_2.htm, last checked Oct. 15, 2012.

[23] Mercator.net, "Wisdom from Massachusetts," *available at* http://www.mercatornet.com/articles/view/wisdom_from_massachusetts

[24] DIANE E. MEIER, M.D., CAROL-ANN EMMONS, PH.D., SYLVAN WALLENSTEIN, PH.D., TIMOTHY QUILL, M.D., R. SEAN MORRISON, M.D., AND CHRISTINE K. CASSEL, M.D., "*A National Survey of Physician-Assisted Suicide and Euthanasia in the United States,"* New England Journal of Medicine, Vol. 338, No. 17, page 1193. Dr. Quill wrote about his experience prescribing barbiturates for a patient suffering from leukemia to kill herself. Timothy E. Quill, *Death and Dignity—A Case of Individualized Decision Making*, 324 N. Eng. J. Med., 691-694 (1991).

[25] Id.

cases examined here were brought by or joined by physicians seeking to legitimate physician-assisted suicide.[26]

Decisions to end life-sustaining treatment do not *per se* result in, or even always hasten, natural death. Karen Ann Quinlan lived for years after her life support was discontinued in the 1970s. By contrast, active physician-assisted suicide always interferes with natural death. And it is always true that those resorting to physician-assisted suicide die not of their diagnosed, terminal illness—the focus of their medical treatment—but of the effects of medicine prescribed to bring about death.[27] Further, there is the danger of the oft-warned of slippery slope, that voluntary assisted suicide today will lead to regimes of involuntary euthanasia tomorrow. This is no mere academic concern. Consider studies of countries that allow physician-assisted suicide, often pointed to by American advocates as the example on this issue that the U.S. should follow, show that anywhere from 22.5 percent to 30.7 percent of euthanized patients did not consent to the procedure.[28]

Additionally, the lessons of the end-of-life debate inform, and are informed by, other areas of medical bioethics. Maureen L. Condic, a physician and an Assistant Professor of Neurobiology and Anatomy at the University of Utah, for instance, links the definitions of life

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[26] Id.

[27] By statute in Washington, "The attending physician may sign the patient's death certificate which *shall list the underlying terminal disease as the cause of death*." Wash. Rev. Code Ann. § 70.245.040(2). Oregon's statute is silent on the cause of death, saying only, "he attending physician may sign the patient's death certificate." Or. Rev. Stat. Ann. § 127.815. Still, the Oregon Public Health Division, in the annual report on required by statute, says that 64 patients ingested "Death With Dignity Act" medications and "63 died from ingesting the medication." *PDF of the report is available at* http://public.health.oregon.gov/ProviderPartnerResources/EvaluationResearch/DeathwithDignityAct/Pages/index.aspx (last checked Nov. 20, 2012).

[28] CitizenLink, The Dutch Disaster, *available at* http://www.citizenlink.com/2010/07/12/the-dutch-disaster/, *citing studies* at *Euthanasia, physician-assisted suicide, and other medical practices involving the end of life in the Netherlands, 1990-1995*. New England Journal of Medicine, 335, p. 1700-1701.

seen in the Quinlan case with the beginning of life: "From the landmark case of Karen Ann Quinlan (1976) on, the courts have consistently upheld organismal function as the legal definition of human life. Failure to apply the same standard that so clearly defines the end of human life to its beginning is both inconsistent and unwarranted."[29]

II: IN RE QUINLAN

In re Quinlan,[30] decided in 1976, is, chronologically, the first of the seminal cases in the right-to-die constellation. The decision is notable not only for its status as the first of the right-to-die cases but also for the natural law subtext, particularly in the lower court's ruling.

Karen Ann Quinlan was a 21-year-old woman when she was admitted to a local hospital's emergency room in April 1975.[31] She had passed out after having "no more than three gin and tonics," according to friends at the party they all were attending.[32] Quinlan's friends checked in on her later that evening and discovered that Quinlan had stopped breathing.[33] The lower court determined she had "ceased breathing for at least two 15 minute periods."[34] After "some ineffectual mouth-to-mouth resuscitation from friends," Quinlan was taken by ambulance to the local hospital.[35] There, her symptoms included a temperature of 100 degrees, unresponsive pupils and a failure to respond even deep pain.[36] Three days later, she was found to be "comatose with evidence of decortication, a condition relating to derangement of the cortex of the brain

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[29] Maureen L. Condic, "Life: Defining the Beginning by the End," *First Things,* Vol. X, Issue: May 2003, *available at* http://www.firstthings.com/article/2007/01/life-defining-the-beginning-by-the-end-24.
[30] In re Quinlan, 70 N.J. 10, 23 (N.J. 1976)
[31] Sandra H. Johnson, "Quinlan and Cruzan: Beyond the Symbols," *Health Law and Bioethics: Cases in Context,* pages 56-57.
[32] Id. at 57.
[33] Id.
[34] Quinlan, *supra.* note 30, at 23.
[35] Id.
[36] Id.

causing a physical posture in which the upper extremities are flexed and the lower extremities are extended."[37] Crucially, she required a respirator to assist with her breathing.[38] Later tests determined that Quinlan's brain activity was "abnormal but it showed some activity."[39] Other neurologic tests, such as a brain scan were "normal."[40]

Ultimately, Karen Quinlan was diagnosed as being in a "chronic persistent vegetative state," defined as "a subject who remains with the capacity to maintain the vegetative parts of neurological function but who…no longer has any cognitive function."[41] This was a new diagnosis, having been defined in the medical journal *Lancet* just three years earlier.[42] And while the Ad Hoc Committee of the Harvard Medical School had only a few years before that proposed bringing such irreversible comas into definitions of death,[43] in the eyes of the law and many of the treating physicians, Quinlan was *not* brain dead.[44] Still, by May 1975, members of Quinlan's family had begun to believe Quinlan was not going to improve and that, as a result, she ought to be removed from the respirator that was sustaining her respiratory functions.[45] The last family member to reach this decision was Quinlan's father, Joseph, whose attempts to become Karen Quinlan's guardian in order to authorize the removal of the respirator was the subject of the litigation.[46]

Because the character and motives of Joseph were central to the Court's consideration of the father as Karen's guardian, the Court embarked on an extended consideration of the Catholic

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[37] Id.
[38] Id.
[39] Id.
[40] Id. at 24.
[41] Id. at 24.
[42] Johnson, *supra.* note 31, at 58.
[43] Id.
[44] Quinlan, *supra.* note 30, at 30.
[45] Johnson, *supra*. note 31, at 59-60.
[46] Id. at 60.

dogma or concepts, that is to say, the natural law tenets relevant to the matter.[47] Informed by an *amicus* brief from Bishop Lawrence Casey, the Court found that Karen Quinlan was alive, but that the termination of a medical procedure "characterized as 'an extraordinary means of treatment' would not involve euthanasia."[48] This reflected five factors, promulgated by Pope Pius XII in 1957, for guiding physicians in the use of "modern artificial respiration apparatus":

> 1. In ordinary cases the doctor has the right to act in this manner, but is not bound to do so unless this is the only way of fulfilling another certain moral duty.
> 2. The doctor, however, has no right independent of the patient. He can act only if the patient explicitly or implicitly, directly or indirectly gives him the permission.
> 3. The treatment as described in the question constitutes extraordinary means of preserving life and so there is no obligation to use them nor to give the doctor permission to use them.
> 4. The rights and the duties of the family depend on the presumed will of the unconscious patient if he or she is of legal age, and the family, too, is bound to use only ordinary means.
> 5. This case is not to be considered euthanasia in any way; that would never be licit. The interruption of attempts at resuscitation, even when it causes the arrest of circulation, is not more than an indirect cause of the cessation of life, and we must apply in this case the principle of double effect.[49]

Because doctors had no hope of Karen Quinlan's recovery and because the continuation of mechanical means to support her body functions constituted "extraordinary treatment," the Catholic Church considered the removal of Quinlan's respirator to be "a morally correct decision."[50] The indefinite article in that phrase is notable; the lower court had stated that "is neither a mortal sin to continue nor discontinue 'extraordinary' means of support for the body functions."[51] In fact, the lower court stated that by precedent in New Jersey, "it seems correct to

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[47] Quinlan, *supra.* note 30, at 30.
[48] Id.
[49] Id.
[50] Id. at 31.
[51] In re Quinlan, 137 N.J. Super. 227, 267 (Ch.Div. 1975).

say there is no constitutional right to choose to die."[52] In so doing, the lower court recognized both the state's right to preserve life and "the presumption that one chooses to go on living."[53] In denying Joseph Quinlan's request to be named Karen's guardian for the purposes of ending the use of the artificial respirator, the lower court concluded, "the right to life and the preservation of it are 'interests of the highest order.'"[54] Here was a court relying fully on the natural law principle proscribing the killing of any human being.

For its part, the New Jersey Supreme Court considered Bishop Casey's statement that "[t]he right to a natural death is one outstanding area in which the disciplines of theology, medicine and law overlap; or, to put it another way, it is an area in which these three disciplines convene."[55] But, this conclusion was relevant "only in the aspect of its impact upon the conscience, motivation and purpose of the intending guardian," and "not as a precedent in terms of the civil law."[56] The question remained as to whether the State of New Jersey, representing society's interests, had the right to trump Quinlan's right to autonomy, as expressed by her father. The Court, in contrast to later decisions in other jurisdictions, listed only one relevant state interest: "the preservation of life," an interest it recognized as "explicitly recognized in our Constitution of 1947."[57] And the life in question here, the court stated, was only a "biologically vegetative remnant of life."[58]

Though the preservation of life was a state interest explicitly recognized in the New Jersey Constitution, the New Jersey Supreme Court said the constitutional right to privacy found

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[52] Id., *quoting* John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576, 580 (1971).
[53] Id.
[54] Id.
[55] Quinlan, *supra* note 30, at 32.
[56] Id. at 33.
[57] Id. at 36.
[58] Id. at 38.

in the U.S. constitution only 11 years earlier in Griswold v. Connecticut[59] and reaffirmed three years earlier in Roe v. Wade [60] was its biggest source of concern. It concluded that this right to privacy "[p]resumably…is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances."[61] Of course, at issue wasn't "a patient's decision to decline medical treatment" but rather the *family's* decision to take their daughter off a life-supporting machine in the expectation that it would end her life. Interestingly, the Court could have reached the same end without rendering its earlier natural law analysis as a side issue. After all, the right of a patent to refuse medical treatment was, as the Cruzan court would later recognize, embodied in the common law tradition.[62]

Still, the New Jersey Supreme Court's reasoning presaged the dominant theme of end-of-life jurisprudence as "follow[ing] the conflict of rights model, pitting the right of the individual to make medical decisions against the right of the state to protect those citizens unable to protect themselves."[63] But Quinlan also shows how the rights model can become blinkered by "personal autonomy"—referred to by Professor Susan Adler Channick, of California Western School of Law, as "the almost unassailable right of an individual to make medical treatment decisions even when such decisions result in the accelerated death of the actor."[64] Such modes of thinking can take an atomized view of human nature that reduces the bonds we form with others to their mere

[59] Griswold v. Connecticut, 381 U.S. 479 (1965).
[60] Roe v. Wade, 410 U.S. 113 (1973).
[61] Quinlan, *supra.* n.30, at 40.
[62] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990), *citing* Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891) and Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 129-130 (1914).
[63] Susan Adler Channick, *The Myth of Autonomy at the End-of-Life: Questioning the Paradigm of Rights*, 44 Vill. L. Rev. 577, 580 (1999).
[64] Id. at 581.

"instrumental value."[65] For, as Professor George argues, while the rational, human person has intrinsic value, that person's "well-being intrinsically includes relationships with others and membership in formal and informal communities."[66] Moreover, the Court could have reversed the lower court within a natural law framework, deciding that a conscious Quinlan would have had a right to refuse extraordinary medical treatment and that her father could make the same decision for an unconscious Quinlan. Instead, it concluded that "there comes a point at which the individual's rights overcome the State interest."[67] In so holding, the court left the ultimate question of the validity of the choice Mr. Quinlan wanted to make unanswered, for as Professor George posits: "The value of autonomy is … conditional upon whether or not one uses one's autonomy for good or ill."[68]

The importance of the bonds formed with others referred to above is witnessed in what can almost be called the confessional writings of those who have assisted in the suicide of another. J. Budziszewski, a professor of government at University of Texas at Austin, notes: "Accessories to suicide often write about the act; they produce page after page to show why it is right. Yet a large part of what they write about is guilt. Author George E. Delury, jailed for poisoning and suffocating his wife, says in his written account of the affair that his guilt feelings were so strong they were 'almost physical.'"[69] Joseph Quinlan committed suicide on August 17, 1996, leaving a note that said, "I love Nancy and am sorry about what happened."[70]

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[65] George, *supra* note 9, at 171-172.
[66] Id. at 173.
[67] Quinlan, *supra.* note 30, at 41.
[68] Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, *23 Harv. J.L. & Pub. Pol'y 599, 710*, *quoting* ROBERT GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 129-60 (1993).
[69] Budziszewski, *supra*. note 15.
[70] Johnson, *supra.* note 31, at 70.

III: CRUZAN V. DIR., MO. DEP'T OF HEALTH

On December 6, 1989, the U.S. Supreme Court heard arguments in Cruzan v. Dir., Mo. Dep't of Health, the first time the Court would consider the so-called right-to-die issue. As in Quinlan, the facts revolved around a young woman in a persistent vegetative state.[71] Nancy Cruzan's injuries occurred on the night of January 11, 1983, when her car overturned after she lost control of the vehicle.[72] A neighbor found Cruzan lying "facedown and motionless" in the ditch where she had landed after being thrown from the car.[73] Police officers, who arrived sometime later and found no pulse or breathing, concluded she was dead and focused on searching for other possible passengers.[74] But when the ambulance arrived, paramedics were able to restore her breathing and heartbeat, though she still was unconscious when they brought her to the hospital.[75] There, she was diagnosed as "having sustained probable cerebral contusions compounded by significant" lack of oxygen.[76] It was estimated that Cruzan's brain was without oxygen for twelve to fourteen minutes; "permanent brain damage generally results after 6 minutes."[77] Cruzan's parents and husband gave permission to all interventions recommended by physicians, including the surgical implantation of a "gastrostomy feeding and hydration tube."[78] Cruzan's sister Christy considered the feeding tube a "bridge to allow Nancy to recover."[79] In February 1983, Cruzan was transferred to facility for "intensive interventions, including attempts at spoon feeding, to try to stimulate her to consciousness."[80] When that failed, she endured a

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[71] Id. at 53.
[72] Cruzan, *supra.* note 62, at 266.
[73] Johnson, *supra.* note 31, at 57.
[74] Id.
[75] Cruzan, *supra.* note 62, at 266.
[76] Id.
[77] Id.
[78] Johnson, *supra.* note 31, at 57.
[79] Id.
[80] Id. at 58.

two-year odyssey of moving among various family homes and a state rehabilitation facility.[81] Believing Nancy Cruzan would never emerge from her persistent vegetative state and on the advice the probate judge who had jurisdiction over her guardianship, Cruzan's family turned to the courts for permission to discontinue her care.[82]

What followed was perhaps "the most famous example" of natural law jurisprudence regarding end-of-life decisions.[83] The Missouri Supreme Court grounded its verdict in the state's interest not just in the prolonging of life, but also "in the sanctity of life itself."[84] As the court stated, "[t]he state's concern with the sanctity of life rests on the principle that life is precious and worthy of preservation without regard to its quality."[85] In this position, Missouri was applying to end-of-life decisions the same "strong predisposition in favor of preserving life" the state had codified for the beginning of life in § 188.010, RSMo 1986, in which the state's General Assembly stated its intention to "grant the right to life to all humans, born and unborn."[86]

The state's interest in prolonging life also mattered, it argued, because "Nancy is not terminally ill. Her death is imminent only if she is denied food and water. Medical evidence shows Nancy will continue a life of relatively normal duration if allowed basic sustenance."[87] While noting the widespread adoption of the Quinlan court's analysis in balancing a patient's rights against the state's interest in preserving life, the Missouri Supreme Court held that

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[81] Id. at 57, 61.
[82] Id. at 61-62.
[83] Kathleen M. Boozang, *An Intimate Passing: Restoring the Role of Family and Religion in Dying*, University of Pittsburgh Law Review, Spring 1997, 58 U.Pitt. L. Rev. 549, 574.
[84] Cruzan by Cruzan v. Harmon, 760 S.W.2d 408, 419 (Mo. 1988).
[85] Id.
[86] Id.
[87] Id.

Cruzan's circumstances differed markedly from Quinlan because the latter dealt with "a terminally ill person."[88]

Finally, a further suggestion of how the court viewed this issue was its framing of the Cruzan family's request as seeking:

> "to allow the medical profession to make Nancy die by starvation and dehydration. The debate here is thus not between life and death; it is between quality of life and death. We are asked to hold that the cost of maintaining Nancy's present life is too great when weighed against the benefit that life conveys both to Nancy and her loved ones…"[89]

As such, the court concluded that the Cruzan family's request was "a thinly veiled statement that her life in its present form is not worth living. Yet a diminished quality of life does not support a decision to cause death."[90] In other words, the Court determined that Nancy Cruzan was valuable as a *human qua human*, and not because of any outside measure of her life.

The U.S. Supreme Court did not expressly decide the Cruzan family's appeal in such natural law terms. First, the High Court found only the state's interest in the preservation of life at issue and did not address the value-of-life question.[91] Still, the Court said, "there is no gainsaying" the interest in preserving life.[92] It then stated that it can be inferred from the Court's jurisprudence that the Fourteenth Amendment protects a competent person's autonomy, in this

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[88] Id. at 412. The New Jersey Supreme Court did not conclude that Karen Quinlan was terminally ill, only that "experts believe that Karen cannot now survive without the assistance of the respirator; that exactly how long she would live without it is unknown." Indeed, the point that dominated the Court's medical discussion was whether Quinlan was alive or "brain dead." Quinlan, *supra.* note 30, at 25.
[89] Id. at 412.
[90] Id. at 422.
[91] Cruzan, *supra.* note 62, at 335.
[92] Id. at 280.

case the right to refuse unwanted medical treatment.[93] In other words, it recognized the right of the competent person to choose a natural death.

The Court further recognized that a pure autonomy argument is insufficient, that "whether a respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests."[94] And it hypothesized about the boundaries of the autonomy argument: "We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically-able adult to starve to death."[95] As such, a state may enact procedural hurdles of the kind Missouri did in requiring that surrogate decision makers provide "clear and convincing evidence" that the incompetent patient would choose to reject medical treatment were they in a position to do so.[96]

Still, the dissenters were clear in their rejection of the natural law's co-equal concerns for individual autonomy and the state interest in the common good. Justice Brennan stated:

> "Because I believe that Nancy Cruzan has a fundamental right to be free of unwanted artificial nutrition and hydration, which right is not outweighed by any interests of the State, and because I find that the improperly biased procedural obstacles imposed by the Missouri Supreme Court impermissibly burden that right, I respectfully dissent. Nancy Cruzan is entitled to choose to die with dignity."[97]

Justice Brennan then diminished Cruzan's *human-qua-human* value, noting that she was little more than "metabolically alive," and "devoid of thought, emotion and sensation."[98] Interestingly, while playing down the state's interest in preservation of life, he invoked the right

[93] Id. at 278.
[94] Id.
[95] Id. at 280.
[96] Id. at 284.
[97] Id. at 302.
[98] Id. at 305.

of a patient's "parents, spouse and children" to reject medical treatment for another in order that their memories of the incompetent patient are not corrupted by "an ignoble end" on a feeding tube that "maintain[s] the corporeal existence" that "degrades the very humanity it was meant to serve."[99] In doing so, he extended patient autonomy even to include an interest in the memories of others. As such, any bonds between Cruzan and interested others in Brenan's eyes are prized only in terms of their instrumental value and not as valuable per se.

Similarly, Justice Stevens rejected the idea that Missouri is protecting the value of *human qua human*. He saw Missouri not as protecting life but rather as seeking to define it.[100] Further, he separates the biology of Cruzan's life from her interests:

> "…only because the Court permits this usurpation, are Nancy Cruzan's life and liberty put into disquieting conflict. If Nancy Cruzan's life were defined by reference to her own interests, so that her life expired when her biological existence ceased serving *any* of her own interests, then her constitutionally protected interest in freedom from unwanted treatment would not come into conflict with her constitutionally protected interest in life."[101]

In fact, sanctity of life in the eyes of Justice Stevens can not be reduced to "merely physiological condition or function."[102] And so, "[t]he State's unflagging determination to perpetuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning, not as an attempt to preserve its sanctity."[103]

IV: WASHINGTON V. GLUCKSBERG, VACCO V. QUILL

[99] Id. at 311.
[100] Id. at 351.
[101] Id.
[102] Id. at 345.
[103] Id.

Washington v. Glucksberg[104] and Vacco v. Quill [105], argued and decided on the same days, dealt with challenges to bans on assisted suicide in the states of Washington and New York. Vacco overturned a Second Circuit ruling that New York's proscription did not treat "equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths because those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs."[106] The Second Circuit had reversed the District Court, which held that "it is hardly unreasonable or irrational for the State to recognize a difference between allowing nature to take its course…and intentionally using an artificial death-producing device."[107] Crucial to the Supreme Court's holding in Vacco was the "distinction between assisting suicide and withdrawing life-sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal traditions."[108] On that point, the Court in a footnote specifically quoted the position of the American Medical Association, Council on Ethical and Judicial Affairs, that dovetails with natural law principles about intent: "The withdrawing or withholding of life sustaining treatment is not inherently contrary to the principles of beneficence and nonmalficence, but assisted suicide is contrary to the prohibition against using the tools of medicine to cause a patient's death."[109]

In Glucksberg, the Court grounded its analysis in a review of 700 years of Anglo-American history of the common law's treatment of suicide, a tradition in which it was widely

[104] Wash. v. Glucksberg, 521 U.S. 702 (1997).
[105] Vacco v. Quill, 521 U.S. 793 (U.S. 1997).
[106] Id. at 798 (*internal quotations omitted).*
[107] Id.
[108] Id. at 800-801.
[109] Id. at 800, note 6 (*internal quotations omitted).*

recognized that what Blackstone called "self-murder"[110] was a "grave public wrong."[111] The Court did not examine the reasoning adopted by those historical sources except for one lengthy quote from 1796 that made clear the natural law foundation: suicide "is so abhorrent to the feelings of mankind, and that strong love of life which is implanted in the human heart, that it cannot be so frequently committed, as to become dangerous to society."[112] In light of this long Anglo-American history of proscribing suicide and assisted suicide, the Court said it was reluctant to expand the concept of substantive due process as requested by the state law's challengers because "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[113] In addition, Justice Rehnquist, writing for the majority, said the Ninth Circuit had misread Cruzan as validating a "right to die," when in fact the Court's ruling in that case was much narrower, grounded only in an assumption that "a liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."[114] But, he stated, what the challengers sought was recognition that "the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself entails a right to assistance in doing so."[115] In short, the challengers sought to prioritize "personal autonomy" over the State's interests as reflected in the natural law.[116] Indeed, the challengers invoked the so-called "mystery of life" passage from Casey,[117] linking assisted suicide with "the right to define one's own concept of

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[110] Glucksberg, *supra.* note 104, at 712, *citing* 4 W. Blackstone, Commentaries * 189.
[111] Id. at 714, *citing* Bigelow v. Berkshire Life Ins. Co., 93 U.S. 284, 286 (1876) (suicide is "an act of criminal self-destruction"); Von Holden v. Chapman, 87 App. Div. 2d 66, 70-71, 450 N. Y. S. 2d 623, 626-627 (1982); Blackwood v. Jones, 111 Fla. 528, 532, 149 So. 600, 601 (1933) ("No sophistry is tolerated . . . which seeks to justify self-destruction as commendable or even a matter of personal right").
[112] Id. at 713, *quoting* 2 Z. Swift, A System of the Laws of the State of Connecticut 304 (1796).
[113] Id. at 720, *quoting* Collins v. Harker Heights, 503 U.S. 115, 125 (1992).
[114] Id. at 723, *quoting* Cruzan, *supra.* n. 62, at 287.
[115] Id.
[116] Id. at 725.
[117] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

existence," a phrase central to the autonomy canon.[118] Still, the Court said, "the history of the law's treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it."[119] Professor Channick posits that the "moral value most persuasive to all the Justices is the protection of life."[120] For as Justice Rehnquist stated, "the State has an interest in protecting vulnerable groups . . . from abuse, neglect and mistakes . . . . The State's interest here goes beyond protecting the vulnerable from coercion; it extends to protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and 'societal indifference.'"[121]

While Glucksberg and Quill were setbacks for advocates of assisted suicide grounding their arguments in the language of autonomy, Neil M. Gorsuch, a partner at Kellogg, Huber, Hansen, Todd & Evans, P.L.L. C, notes that the various concurring opinions show that "five votes on the Court appear to be leaning in favor of recognizing a constitutional right to assistance in suicide for competent, terminally ill persons suffering severe pain."[122] Justice O'Connor, for instance, conceded that States had in interest in preventing "the risk that a dying patient's request for assistance in ending his or her life might not be truly voluntary."[123] Still, Justice O'Connor construed the State's interest not as protective of the sanctity of life but only as "protecting those who might seek to end life mistakenly or under pressure."[124]

Justice Stevens described the State's interest more broadly:

> "The State has an interest in preserving and fostering the benefits that every human being may provide to the community—a

[118] Glucksberg, *supra*. note 104, at 726-727, *quoting* Casey, at 851.
[119] Id. at 728.
[120] Channick, *supra.* note 63, at 604.
[121] Glucksberg, *supra* note 62, at 731.
[122] Neil M. Gorsuch, The Right To Assisted Suicide And Euthanasia, 23 Harv. J.L. & Pub. Pol'y 599, 619.
[123] Glucksberg, *supra.* note 62, at 738.
[124] Id. at 737.

> community that thrives on the exchange of ideas, expressions of affection, shared memories and humorous incidents as well as on the material contributions that its members create and support. The value to others of a person's life is far too precious to allow the individual to claim a constitutional entitlement to complete autonomy in making a decision to end that life."[125]

Still, while the "preservation of human life" commands the "maximum protection of every individual's interest in remaining alive… this interest is not a collective interest that should always outweigh the interests of a person who because of pain, incapacity, or sedation finds her life intolerable, but rather, an aspect of individual freedom."[126] In short, Justice Stevens said, a "State's interest in the contributions each person may make to society…does not have the same force for a terminally ill patient faced not with the choice of whether to live, only of how to die," though he was quick to add that this "does not mean that the lives of terminally-ill, disabled people have less value than the lives of those who are healthy."[127]

Finally, Justice Stevens brushed aside another potential societal interest, the fear that "permitting physicians to assist in suicide is inconsistent with the perception that they serve their patients solely as healers," saying that for some patients "the refusal to dispense medication" that would end their lives "would be inconsistent with the healing role."[128]

In his concurrence with Justice O'Connor, Justice Souter admitted the State's interest "in protecting terminally ill patients from involuntary suicide and euthanasia, both voluntary and nonvoluntary."[129] In fact, the "substantiality of the factual disagreement" over this issue was

[125] Id. at 741.
[126] Id. at 745.
[127] Id. at 746.
[128] Id. at 748.
[129] Id. at 782.

enough to persuade him that the State had an interest in protecting patients.[130] That said, he urged state legislatures to "obtain the facts necessary for a judgment about the present controversy."[131]

Lastly, Justice Breyer, while joining Justice O'Connor's concurrence, indicated his potential support for a right "to die with dignity," where the core of the right would be to have "personal control over the manner of death."[132]

Professor Channick notes, however, that the Glucksberg and Vacco decisions helpfully rejected any moral equivalence between allowing a patient to die by forgoing life-sustaining treatment and aiding a patient's death by prescribing, and perhaps administering, the drugs that would end the patient's life.[133] Her reasoning was that, in declining to extend the right to refuse treatment to include assisted suicide, the Court's public policy-based decision "force[s] assisted suicide's proponents to make the case for assisted suicide as a moral and desirable social practice."[134]

V: THE LABORATORY OF STATE COURTS

Oddly, perhaps the most well-known assisted-suicide decisions, involving Jack Kevorkian, add little to the right-to-die analysis. Dr. Kevorkian was acquitted in 1994 on assisted suicide charges after a judge instructed a jury that it could return a guilty verdict only on a finding that the defendant "intended solely to cause" death and not some other purpose, "such as

[130] Id. at 786.
[131] Id. at 787.
[132] Id. at 790. Despite the gentle marketing that Breyer suggests, it may be helpful to remember that Death With Dignity, a pro suicide group formerly named the Hemlock Society, for years recommended suicide by wrapping helium-filled plastic bags around one's head in the name of dignity. Humphry, Derek (1991). *Final Exit: the Practicalities of Self-Deliverance and Assisted Suicide for the Dying*. New York: Delta Trade Paperback.
[133] Channick, *supra.* note 63, at 607.
[134] Id.

relieving suffering."[135] Dr. Kevorkian was convicted in 1999 of second-degree murder in a separate case involving the death of a woman on the television program "60 Minutes."[136] In both prosecutions, the courts mostly restated the Supreme Court's Cruzan analysis as it pertained to the patient, but not to the physician.

More germane is Superintendent of Belchertown State School v. Saikewicz.[137] There, the Supreme Judicial Court of Massachusetts held that the general right to refuse medical treatment extended to a mentally incompetent patient.[138] In so holding, the Court determined, using a substituted judgment standard, that the severely retarded 67-year-old patient at the center of the case would not have chosen to continue treatment were he competent to do so.[139] Though the court said the "supposed ability of Saikewicz, by virtue of his mental retardation, to appreciate or experience life had no place in the decision before them," the substituted judgment standard included among its factors "the present and future incompetency of the individual,"[140] as well as such objective criteria as the "supposed inability of profoundly retarded persons to conceptualize or fear death" may be required.[141] In other words, Mr. Saikewicz, contra the court's determination that most patients elect chemotherapy, would not chose treatment, in part because of the possible adverse side effects that competent persons are aware of and even though the profoundly retarded can not conceptualize or fear death. The court stated that it employed the

[135] Gorsuch, *supra.* note 121, at 651, *citing* Jon Kerr, Kevorkian Takes Stand in Assisted Suicide Trial, West's Legal News Crim. Just., Mar. 4, 1996, available in 3-4-96 WLN 1117.
[136] Id. at 600-601.
[137] Superintendent of Belchertown State Sch. v. Saikewicz, 373 Mass. 728 (1977).
[138] Id. at 752-753.
[139] Id.
[140] Id. at 754.
[141] Id. at 751.

substituted judgment standard "because of its straightforward respect for the integrity and *autonomy of the individual*."[142]

Where Quinlan stated just one compelling state interest, Saikewicz addressed four: "(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession."[143] Of these, the greatest was the interest in the preservation of life, though the "interest of the State in prolonging a life must be reconciled with the interest of an individual to reject the traumatic cost of that prolongation."[144] Moreover, the prolongation of life must not "cheapen the value which is placed in the concept of living."[145] Indeed, the court said "the value of life as so perceived is lessened not by a decision to refuse treatment, but by the failure to allow a competent human being the right of choice."[146] The second right implicated in Saikewicz was the ethical integrity of the medical profession. Here, the court found no conflict since "prevailing ethical practice seems to be to recognize that the dying are more often in need of comfort than treatment."[147] Still, the court stated that the rights of bodily integrity and privacy are superior to the medical profession's institutional considerations.[148] The Saikewicz court also presaged Vacco, recognizing in a footnote that intent separated refusing medical treatment and suicide, though it

[142] Id. (*emphasis added*)
[143] Id. at 741. Quinlan did address the issue of "offending prevailing medical standards," determining that "the state of the pertinent medical standards and practices which guided the attending physicians in this matter is not such as would justify this Court in deeming itself bound or controlled thereby…" Quinlan, *supra.* n. 30, at 51.
[144] Id. at 742.
[145] Id.
[146] Id.
[147] Id. at 743.
[148] Id.

went on to note that the state interest here was the prevention of "irrational self-destruction,"[149] leaving open the possibility that the state had not interest in rational self-destruction.

The same Massachusetts court eight years later, but two years before the Supreme Court's 700-year exploration of suicide's place in the Anglo-American history in Cruzan, found that "the right of self-determination and individual autonomy has its roots deep in our history."[150] It followed that statement with a quote from John Stuart Mills; that was all it said on the subject.[151]

That same year, a California court allowed a competent quadriplegic woman to refuse medical treatment in the form of a feeding tube in part because the right to privacy extends to "personal dignity."[152] In 1988, another California court concluded that "the courts in twelve states, including the highest courts of ten, have approved decisions to forego life-sustaining treatment for permanently comatose patients. All decisions to the contrary appear to have been reversed by higher courts."[153]

In 1990, shortly after Cruzan was decided, Nevada's Supreme Court recognized that a state's interest in preserving life was "fundamental and compelling" and, "[i]ndeed, it constitutes a basic purpose for which governments are formed."[154] Still, in ruling for the right of "a non-terminal, competent, adult quadriplegic" to remove his life-sustaining respirator, it said, "the present or prospective quality of life may be so dismal that the right of the individual to refuse

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[149] Id. at 744, note 11.
[150] Brophy v. New England Sinai Hosp., Inc., 398 Mass. 417, 430 (1986), Decided Sept. 16.
[151] Id.
[152] Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1145, 225 Cal. Rptr. 297, 306 (Ct. App. 1986), decided April 16.
[153] Conservatorship of Drabick, 200 Cal. App. 3d 185, 189, 245 Cal. Rptr. 840, 841 (Ct. App. 1988), note 1.
[154] McKay v. Bergstedt, 106 Nev. 808, 816 (1990).

treatment or elect a discontinuance of artificial life support must prevail over the interest of the State in preserving life."[155] This patient, already dead before the court announced its decision, sought death not because of unendurable pain of the kind referred to by Justices O'Connor, Souter or Breyer in Cruzan, but because he "despaired over the prospect of life without the attentive care, companionship and love of his devoted father."[156]

As in Quinlan, the judge in the predecessor to Glucksberg, Compassion in Dying v. Washington, tied death at the beginning and the end of life:

> "Like the decision of whether or not to have an abortion, the decision how and when to die is one of 'the most intimate and personal choices a person may make in a lifetime,' a choice 'central to personal dignity and autonomy.'"[157]

VI: NEO-NATURAL LAW MOVEMENT

It seems clear that the death of natural law jurisprudence is greatly exaggerated. Yes, Quinlan was grounded in a right to privacy in which autonomous arguments trump the state interests that serve as a proxy for an explicit natural law argument. But in Cruzan, Glucksberg and Vacco, the Supreme Court recognized the central tension in the natural law between the autonomy of the individual and the competing interests of society and the state. But Cruzan changed that.

The Court in Cruzan found that suicide, and thus assisted suicide, was not a fundamental right, that the preservation of life was a legitimate interest of the state and that refusing medical treatment isn't the same as killing oneself. Vacco centered on an "intent" analysis that would be

[155] Id. at 818.
[156] Id. at 812.
[157] Compassion in Dying v. Washington, 79 F.3d 790, 813-14 (9th Cir. 1996).

welcome in any natural law discussion in concluding that refusing medical treatment and assisted suicide were fundamentally different "act." While Glucksberg determined that assisted suicide was anathema to the country's legal traditions. And both decisions confirmed that the state has interests in end-of-life decision making that it can protect in law. Until overruled, these Supreme Court decisions and the natural-law-type reasoning they reflect are good law.

Furthermore, the Supreme Court has taken end-of-life jurisprudence out of the realm of privacy and, as Justice Souter demonstrated in his Cruzan concurrence, placed it squarely in the category of Substantive Due Process analysis. Even in the non-landmark cases discussed above, courts presume to balance the rights of state interests against the right of individual autonomy. Such a framework by its nature adopts the tension inherent in natural law reasoning. This is not to say that Due Process is natural law's twin. Indeed, as former Professor Mattei Ion Radu noted, many natural law thinkers conclude that many of the Court's conclusions in substantive due process decisions are incorrect because they extended constitutional protection to practices they see as morally incorrect.[158] Still, the Court's substantive due process analyses on end-of-life decision making has properly recognized that life has value even when reduced to mere biological functions.

That said, as the above cases show, autonomy arguments are more prioritized in non-landmark decisions from around the country. This is troubling for a number of reasons. First, as seen in Cruzan, pure autonomy arguments are less likely to contemplate the kinds of procedural safeguards protective of life and the interests of the state that the Supreme Court endorses in Cruzan. Presently, 47 states prohibit assisted suicide, and the two states that recognize it by

[158] Id. at 248

statute have instituted myriad procedural steps designed in part to discourage the practice.[159] But arguments for the supremacy of autonomy rest on the notion that human life is only subjectively valuable. As Professor Adam J. MacLeod states, "[i]n other words, any value in life is to be found only in the extrinsic ends that is serves. When those ends cease to be valuable, it is reasonable to destroy one's life."[160] The evidence outside the courtroom shows that society may not be willing to wholeheartedly adopt this value system. As Professor MacLeod notes, states have numerous provisions discouraging suicide generally: budgets that fund suicide-prevention hotlines, laws that protect anyone who interferes in a suicide from liability, and laws that allow involuntary commitment of those likely to harm themselves.[161] This matrix shows that society still believes that "[a] suicide harms both the individual and the community simply because it causes the loss of a human life; the value of the life is neither subjective nor relative to other considerations."[162]

Second, the autonomy decisions, as judged by the Saikewicz and Terry Schiavo case, courts have a low threshold for determining that an incompetent patient would choose to refuse medical treatment. In Saikewicz, the judge determined that while most people would opt for what can be painful medical treatment of their leukemia, the profoundly retarded Saikewicz would not. And in Schiavo, the court ordered the removal of a feeding tube though the evidence

[159] Adam J. MacLeod, *The Mystery Of Life In The Laboratory Of Democracy: Personal Autonomy In State Law*, 59 Clev. St. L. Rev. 589, 613
[160] Id. 613.
[161] Id.
[162] Id.

that the incompetent patient would have made that decision was less than clear and convincing.[163] Additionally, autonomy even can trump the rights of dependent third parties.[164]

Also, the Glucksberg-Vacco decisions were narrow and tenuous, as Mr. Gorsuch rightly pointed out. And as Professor Mattei Ion Radu notes: "While Glucksberg clearly upheld the right of states to ban assisted suicide, the Court said nothing about the constitutional status of a potential statute permitting the practice."[165]

At this point, perhaps it is helpful to repeat the quote from the Class's bioethics textbook that served as a starting point for this analysis: "[b]ioethics scholars have started to question the application of the traditional principle-based ethical analysis as unnecessarily narrow." From the analysis above, I think it is clear the opposite is true. For only in natural law modes of reasoning are the interests of all interested parties fairly represented. The non-landmark cases examined here show that respect for autonomy quickly turns until untrammeled authority. And in untrammeled autonomy, there is little room for the interests of others.

Of course, Professor Radu has noted a divergence among natural law jurisprudes on the point of whether the natural law should even play a role in Supreme Court thinking.[166] The anti position is that any reliance on the "higher law of nature" will enable justices to ignore or

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[163] Maura A. Flood, "*Treatment of the "Vegetative" Patient: The Legacies of Karen Quinlan, Nancy Cruzan and Terri Schiavo*," 1 J. Health & Biomed. L. 1, 35

[164] Compassion in Dying, *supra.* note 157, at 827, where the court concluded: "The state clearly has a legitimate interest in safeguarding the interests of innocent third parties such as minor children and other family members dependent on persons who wish to commit suicide. That state interest, however, is of almost negligible weight when the patient is terminally ill and his death is imminent and inevitable."

[165] Mattai Ion Radu, *Incompatible Theories: Natural Law And Substantive Due Process*, 54 Vill. L. Rev. 247, 261.

[166] Id. at 280.

interpret the legislatively enacted positive law according to their own whims.[167] But in contradistinction to this paper, this point ignores the utility of the natural law to, in Professor Barnett's words, "tell us what we should be looking for."

Professor Emeritus Charles Rice, of the University of Notre Dame Law School, notes that another Notre Dame law professor used to tell his students that "The academics repeatedly declare the natural law to be dead, but every twenty-five or so years it comes in against by the back door when some crisis shows the failure of utilitarian positivism."[168] Were the Supreme Court's end-of-life grounded in the privacy right relied on by the Quinlan court, then perhaps the natural law mode of reasoning might find itself on life support. And yet, as long as judges look to the legal history, foundations and traditions of American jurisprudence, as Chief Justice Rehnquist did in Glucksberg, the natural law will continue to influence their decision making.

[167] Id., *see also* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (Free Press 1990).
[168] CHARLES RICE, 50 QUESTIONS ON THE NATURAL LAW, WHAT IT IS & WHY WE NEED IT, 26, (rev. ed., Ignatius Press, 1999).